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In the Supreme Court

OF THE

United States

OCTOBER TERM 1964

No. 643

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Petitioners,

vs.

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Respondents.

PETITIONERS' ANSWER TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case involves a million dollar default judgment that was entered without allowing a hearing under Rule 37(d).

Two of the wrongfully defaulted defendants have had their defaults set aside, yet the judgment stands. The wrongfully defaulted defendants face economic ruin.

The "without-due-process of law" provision of the Constitution is designed to give protection from what in this case amounts to complete disaster, after years of effort and over a million dollars of invested money, in building an industry on a sound economic basis.

All three defendants were defaulted. The default of the two defendant corporations has been reversed on appeal and their counterclaim ordered reinstated (Opinion, Appendix to Petition for Certiorari, p. 32). The counterclaim (R 61) deals with the failure to comply with Rule 23(b) (R 63) but the judgment concludes that Rule 23(b) was complied with.

The corporations thus have been denied a hearing where *proof,* rather than allegation, is required. The default resulted in the question of compliance with Rule 23(b) being determined as a matter of *allegation.* Had the corporations been allowed a hearing on the merits, *proof* of these allegations would have been required. The failure of respondent's counsel to *prove* compliance with Rule 23(b) would have defeated the action, and a hearing thereon would have demonstrated a *refusal* of Respondent Dolman to present her purported grievances to the stockholders.[1]

In addition, a hearing requiring proof of the 23(b) allegations would have disclosed that *no qualified plaintiffs supported the action.* Affidavits are dis-

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[1]A verbatim typescript of the proceedings at a stockholders' meeting attended by Dolman shows that she flatly *refused* the request of the other stockholders that she state to them the basis of her complaints. This refusal is unmistakable:

"Mr. Connolly. Calling your attention to the fact that in your own letter to my client you stated that many things were not included in the notice of the meeting that should be

cussed later that show that the names of all of the associated plaintiffs were used without their knowledge or consent.

Indispensable parties defendant also were excluded and not allowed to be heard. Setting aside their default does not remove the effect of a judgment that is adversely affecting them, which is affirmed against their interests, without their having an opportunity to be heard.

The default herein was based on the absence of only one defendant at his deposition because of a serious physical condition, where the time selected was made

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discussed. And as I recall, you told me that one of Mr. Janney's habits was not to let the stockholders know about anything that went on up here." (R 1314:13-18.)

"Mr. Janney. I'd like to know what the things are that we have concealed. I have got a right to ask that question." (R 1314:20-21.)

"Mr. Kennedy. I think it should be answered." (R 1314:23.) . . .

"Mr. Janney. *What is it that we ought to reveal to stockholders that we have withheld?*

Mrs. Dolman. *I am not on the board of directors.*" (R 1315:5-20; emphasis added.) . . .

"Mr. Janney. I think that information that has been withheld should be let out and put right on top of the table.

Mr. Connolly. Mrs. Dolman, you are the only one that can say. . . ." (R 1320:13-31.)

"Mr. Janney. . . . I would like to ask Mrs. Dolman as a special favor to me personally, as well as for the purposes of the meeting, to state what these people said on what there was that I neglected to say that I should have said.

Mrs. Dolman. *No comment.*

Mr. Janney. What do you mean, 'No comment'?

Mrs. Dolman *I have nothing to say.*

Mr. Janney. You said——

Mrs. Dolman. *I have nothing to say.*" (R 1326:30 to 1327:11; emphasis added.)

This material was not before the Trial Court because of the default of all defendants. It was presented to the Appellate Court by affidavit (R 1432, R 1439).

with the knowledge of the illness of the party notified. There was no trial as to the cause or the willfulness of absence.

No notice was given for a hearing to allow evidence of the reasons for the non-appearance of defendant Janney for deposition; nor a hearing as to the serious nature of the illness; nor the reasons for the order of a competent Doctor requiring a period of complete rest from mental strain, nor the advice of another doctor for a complete change of mental surroundings.

Through this error, there was excluded testimony as to the thorough medical examination of a competent Doctor and confirmation of diagnosis by another and the treatment later rendered by a third.

Rule 37(d) required a hearing with notice as to the willfulness of the absence of this defendant. For exploring this necessary fact there was no hearing allowed, but the default was ordered. Default procedures then resulted in a false picture replacing facts, with the court accepting the false picture.

As a specific example of how false and misleading testimony is *invited,* by default proceedings which deny the right to cross-examine the witness, the following is taken from the Record:

> Respondents' attorney quoted from the resolution of the Board of Directors of Pioche Power and Light Company wherein was approved the offer of Mr. Janney to assume the interest charge of $2,408.18 plus principal owing to Pioche Mines Consolidated, Inc. in the amount of $4,000.00. Total—$6,408.18.

Plaintiff Dolman then testified as follows:

"Q. Offhand do you know, Mrs. Dolman, what percentage of the total stock that gives Mr. Janney in this Pioche Power and Light Company?

A. I couldn't give you the percentages, but it would give him the controlling interest. . . .

Q. You say he has a controlling interest in the Pioche Power and Light Company. Now, *that obligation that was* assumed by Mr. Janney, or *purportedly assumed by Mr. Janney,* of a debt owed by Pioche Mines Consolidated, *was that ever paid to Pioche Mines Consolidated by Mr. Janney?*

A. Not to my knowledge.

Q. Have you checked the records for that transaction?

A. Yes, I did.

Q. Anyone else do the same?

A. Yes.

Q. Who was that?

A. Yourself, Mr. O'Connor (of counsel for Respondent Dolman herein)" (T. 1430:13-25, emphasis added).

The documents referred to in this testimony showed exactly the opposite. For instance, the Journal Entry of Pioche Mines Consolidated, Inc., Plaintiff's Exhibit 10, page 968, for the month of August, 1939 shows:

"Advanced by stockholders—John Janney accounts receivable—Pioche Power and Light Company to credit account of Pioche Power and Light Company with $6,408.18, *amount assumed by Mr. John Janney and charged against his personal advance account.* $2,408.18 interest charge to be paid and $4,000.00 applied to principal as agreed.

> $6,408.18" (page 968 of Plaintiff's Exhibit 10, reproduced in Record on Appeal, Vol. 23, page 2970, Emphasis added).

If allowed to be heard, Petitioners could show that $13,564.79 was still due to Mr. Janney for cash that he had advanced to the company, after the $6,408.18 was deducted.

The records of Pioche Power and Light Company also show the sum of $6,408.18 had been paid (R. 1259).

The stock records of Pioche Power and Light Company, (R 1257, R 1258) contradict the accusation that Mr. Janney acquired the controlling interest of Pioche Power and Light by this transaction.

The affidavit of Howard M. Calhoun shows:

> "That he is Secretary of Pioche Power and Light Company, and has possession and custody of the Stock records, and books of that company. . . .
>
> "4. That John Janney's 200 shares were more than a majority of the 295 shares of the outstanding Capital Stock of Pioche Power and Light Company prior to his assuming the debt to Pioche Mines Consolidated, Inc. . . .
>
> "8. After Certificate No. 18 for 574 shares of stock was issued in consideration for assuming the $6,408.18 debt to Pioche Mines Consolidated, Inc. there were 8 stockholders of record holding a total of 869 shares of outstanding Capital Stock and *John Janney's position, as the controlling stockholder, remained unchanged by the transaction*". (R 1257, R 1258, emphasis added).

This material was not before the Trial Court because of the default.

It was presented to the Appellate Court by affidavit (R 1438, R 1439).

Nevertheless, the Trial Court's finding was as follows:

> "10. An asset of defendant corporation's Pioche Mines Consolidated, Inc. was wrongfully converted to his own use by the said John Janney, to-wit, a monetary obligation owed to said corporation by the Pioche Power and Light Company, without any adequate consideration therefor" (T 1248).

Thus the erroneous testimony of Plaintiff Dolman as to what appeared in these records, was the basis for the Court's finding. This false testimony was assisted in this result by her attorney. (T 536):

> "That debt that John Janney says, 'I will take over' . . . that debt from Pioche Power and Light Company to Pioche Mines Company actually never was paid," (T 536).

T 535:

> ". . . We will show Pioche Power and Light Company belongs to Pioche Mines Company and that John Janney stole it from the stockholders of Pioche Mines Company . . . ." (T 535).

Another example of how default procedures have led in this case to completely erroneous conclusions on complicated issues is the matter of the Ely Valley Mine.

Ely Valley Mine

Errors invited by default procedure are here shown where parties who occupy the position of indispensable parties, are not allowed to cross-examine witnesses while giving consideration to the ownership of the Ely Valley Mine.

All the documents which establish the facts relating to this matter were confused to the Court as a result of default procedures. These errors were not permitted to be called to the attention of the Court by the defaulted defendant Ely Valley Mines, or by defendant Pioche Mines Consolidated.

An illustration:

1. "Q. (By Mr. O'Connor) So in 1928 you took the Ely Valley Mine away from the Pioche Company, in effect?

   Mr. Horton. Objection.

   The Witness. (Mr. Janney) Never took it away from them" (T 2339, Dec. 14, 1961)——

   "Q. Yes, and in 1928 you took away—that was the word you used yesterday——

   A. I didn't state——

   Q. Whatever you used——

   A. I can give you a correct statement.

   Q. What?

   A. If you want, I can give you a correct statement.

   Q. Well. I am trying to recall what you said yesterday. Withdraw the question." (T 2368, Dec. 15, 1961).

2. At T 1916:10 the Trial Court asks counsel for Respondent Dolman if any damages whatever

were asserted for mismanagement, to which said counsel responded:

"Mr. O'Connor: Not a penny." (T 1916:12).

3. Counsel for Respondent Dolman specifically declared that the Ely Valley Mine had:
"nothing to do with the amount of damages." (T 2301:17, 18).

4. Again, at T 2278:5-7, counsel for Respondent Dolman is shown to have:

"withdrawn any reference to the Ely Valley Mine." (T 2278: 5-7).

Thereby counsel closed the door at the default hearing to the proof of the falsity of his representations.

At T 677, Respondent's counsel represents that expenditures made by Pioche Mines Company on the Ely Valley Mine from November 30, 1923 to November 30, 1928 (during which period Pioche Mines Company had a lease and option on the Ely Valley Mine), were "closed-into Mine Development" (T 677: 14).

Counsel then represents that ALL moneys spent by Pioche Mines Company for "Mine Development" were spent on the Ely Valley Mine alone! Counsel states: "The Ely Valley account is the amount of $491,225.95" (T 678:11, 12).

Had Petitioners been allowed to be heard, they could have shown that the figure of $491,225.95 would cover amounts expended in an extensive development program on its entire mine holdings, over a period of many years; that the amount spent by Pioche Mines *Company, (not* Pioche Mines Consolidated) to main-

tain the Ely Valley lease was barely enough to hold the unpatented mining claims, which Pioche Mines Company was obligated to do by virtue of its lease and option to acquire the property; that the "considable expenditures" (Opinion, p. 22) in mine development work expended by Pioche Mines Company on leased properties, were actually spent on *other* properties, some three miles distant from the Ely Valley Mine; that all of the funds expended by Pioche Mines Company at this period on either the Ely Valley Mine or on the other leased properties were supplied by John Janney; that he was never repaid for these advances by Pioche Mines Company; that John Janney, after the lease and option of Pioche Mines Company on the Ely Valley Mine expired, did the assessment work and paid the taxes on the Ely Valley Mine, as he did with other mining properties that he owned; that these mining properties *including the Ely Valley* Mine, were the very properties referred to by counsel for Respondent Dolman as belonging *to John Janney,* when they represented John Janney and Pioche Mines Consolidated in the counterclaim they prepared and filed against Fidelity-Philadelphia Trust Company (R 26, par. 5); and that Respondent's counsel joined with Respondent Dolman's demand that this very counterclaim against Fidelity-Philadelphia Trust Company be surrendered, or "ruinous" litigation would follow.

(This endorsement of Dolman's handwritten demand (Exhibit L-2) is indicated by her use of the letters "T.R." (Theodore Roche, the head of Respon-

dent's law firm). The letter is reproduced in part at pp. T 3044-T 3046 of Vol. 23. The exhibit was rejected by the Trial Court (T 1943) because of the default).

Counsel also represented that Pioche Mines Consolidated, Inc., "claimed and represented to prospective stockholders and represented to the Securities and Exchange Commission that it had a long term leasehold interest on Ely Valley Mine" (T 791) which "had at least eighteen years to run." (T 791) He represented that the SEC prospectuses showed this (T 791). What the prospectuses actually showed (pp. T 2947,ff.) was a long term lease on the Raymond and *Ely* Mine, and the Meadow *Valley* Mine, together with five other mines. (See T 2948 in Vol. 23 of Transcript), *not one* of which was the Ely Valley Mine. The Raymond and Ely and Meadow Valley mines lie near the eastern edge of the town of Pioche. The Ely Valley Mine is three miles distant, to the West. (See map on page T 2950).

Pioche Mines Consolidated had no lease, no option or any other interest in the Ely Valley Mines (T 2947, T 2948).

The position of the Ely Valley Mine in the serious effort to establish a mining industry in Pioche is most clearly shown by the statement of the duties of the Trustee under the Ely Valley Trust Agreement.

In that document (Exhibit A attached to Plaintiff's Exhibit 19, T 2994-T 2997) Mr. Janney, the President and leading stockholder of the Pioche Mines Company, as owner of the property known as the Ely Val-

ley Mine, conveyed it with a group of surrounding properties, to a Trustee.

The Trustee's duties and obligation were set forth in detail in that four-page agreement where the Trustee was authorized to hold the said property, to borrow money using it as security, to spend the money for work on the mine,

> ". . . and in addition the party of the second part Trustee agrees to guard the stockholders interest in the Pioche Mines Company, a Nevada Corporation, and to protect their rights in the event of action adverse to their interest, or in any matter affecting their rights, whether as stockholders of the Pioche Mines Company or as stockholders in exchange for shares in the Pioche Mines Consolidated, a Nevada Corporation, and in event of litigation affecting the interests of the stockholders of the said companies to provide, if possible, by the use of the properties herein conveyed in trust, such money as may be needed for the protection of the interests of the said stockholders . . ." (T 2995).

The Trustee is further authorized,

> "to borrow money on the security of the property held in trust by him under this agreement for the uses and benefits aforesaid, or he may sell and convey an undivided fractional interest in the said property, or any part thereof, but not to exceed a 25% interest, or he may borrow money for the uses aforesaid and grant an option under and by virtue of which the said loan may be converted into a payment for an interest in said property as aforesaid, or said loan or loans

may, at the option of the lender, be represented by or converted into shares of Treasury stock in a corporation, which is proposed later to be formed for the operation of the above named mining claims." (T 2995).

"It is further agreed that said Trustee is authorized and empowered to form a corporation when in his judgment it may become necessary or advisable so to do in carrying into effect the purposes of this trust." (T 2996).

If the parties in interest would be allowed to be heard—one the owner of the property, Ely Valley Mines, Inc.; *the other* the Pioche Mines Company (which had held an option and lease which it had abandoned); it could be shown by competent evidence, instead of by statements unsupported by evidence:

1. The amount of money used for the protection of the stockholders and how used.

2. The amount used for the development and equipment for the property.

3. The production from the mine and how expended; what profits were distributed, and what were put back in equipment and development.

4. The requirements of the War Production Board contracts.

5. The agreements with which first the trustee and then the directors had to deal, and the steps taken to discharge all obligations under these contracts and claims that would represent disputed demands, if any.

The statement of counsel should not be the basis for the disposal of the rights of absent parties—certainly not if the parties were not allowed to be heard, and their default was declared error on appeal.

PIOCHE MINES CONSOLIDATED DIRECTORS

Pioche Mines Consolidated as result of the 1942 Settlement agreement became merged with two other companies—Pioche Mines Company and Nevada Valcano Mining Company. This was effected by the vote of the stockholders of the three companies in December 1943 where was accepted the offer made by the debenture holders.

It was provided that a designated board of directors be elected, one of which directors represented the debenture holders. This board must continue until their successors are duly elected which could not be until the settlement agreement was carried out to the extent that the exchange of shareholders progressed far enough to provide a complete corporate organization.

The Trust Company and the Bondholders failed to complete their agreement, failed to exchange the securities, and then used their positions to block financing efforts. This is an issue raised in the pending counter claim action. In the decision reported in 202 Fed 2d 949 the Court ordered the Trust Company action dismissed—in 206 Fed 2d 336 the counterclaim is ordered reinstated.

This is the counterclaim held up until 1958 by failure of the District Court to carry out the Circuit Court of Appeals order of 1953 and the Mandamus order of 1956 and held up from then on until now by the Dolman litigation which is now declared illegal on appeal.

During this delay in completing the exchange of securities the stockholders meetings of old companies have been held in adjourned session, with some shares exchanged and some not exchanged, leaving the newly merged company with no completed lists of stockholders sufficient to bind the absent stockholders.

The Board of Directors elected under the agreement have kept taxes paid, the assessment work done, the properties protected and in good condition and necessary expenses have been provided without calling on stockholders.

Meantime, the Nevada Statute provides that the present Board must continue until their successors are duly elected.

QUESTIONS PRESENTED

Petitioners' questions are not answered by Respondent's brief. Respondents "corrected" statement of the case is nothing more than pulling from the record a parade of accusations on which the right to require proof or to cross-examine was denied because of the default.

The seriousness of these accusations serves to emphasize the importance of allowing Petitioners the right to be heard on them.

The corporations were denied the right to be heard on whether one of their directors (Baker) "had denounced Janney for his outrageous frauds on the corporations and their investors" (Opposition, page 4), or whether Mr. Baker's position is as stated in his Petition for Rehearing, namely, that the corporations' President was an honest and efficient mine manager, on the basis of whose integrity and ability, fully informed investors, including Mr. Baker, had invested hundreds of thousands of dollars.[2]

Another example of where the corporations were excluded is cited in footnote 3. Many other examples could be given.

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[2]"2. Petitioners represent, either in themselves or through their immediate families a cash investment in Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. of $500,000 or more. . . .

"8. Prior to the commencement of the instant litigations, the reputation of Appellants' President as a competent, honest and efficient mine manager, was excellent, and this reputation was a principal contributing factor in the investments made by Petitioners in the Appellant corporations.

"9. Petitioners have personal knowledge of one or more of the allegations found to be true by the Trial Court and approved by this Court in affirming the million dollar default judgment, and assert that said allegations are false, and petitioners have not been heard in the determination of these issues.

"10. Major financing of Appellant corporations will be necessary promptly in order to repair the properties of Appellant corporations and to prevent further damage or destruction.

"11. If said million dollar default judgment is allowed to stand, on which Appellant corporations and Petitioners' representatives have not been allowed to be heard, this indispensable financing will be impossible.

"Respectfully submitted,
Richard K. Baker, . . ."

(Petition for Rehearing, sworn June 15, 1964, filed with the Court of Appeals, pages 1-3).

[3]Respondents charge (Opposition, page 4) that a "purported director had had nothing to do with the companies for 30 years (T 1421)". The basis of this statement (T 1421) is Mrs. Dolman's

The truth or falsity of such accusations is a matter of *corporate* concern, yet neither corporation was heard.

Additionally complicated charges such as appear in this case cannot be expected to be correctly determined in default proceedings.

STATEMENT OF THE CASE

Respondents' Brief in Opposition (page 3) claims that Petitioners' Statement of the Case does not correctly represent the circumstances of the case. However, Respondents have failed to show a single instance in which Petitioners' Statement of the Case is inaccurate, or in which a "question presented" does not apply to the instant case.

Indispensable Parties Plaintiff Absent

Respondents' Brief contends (p. 5) that T 581, T 592, and T 616 are authorizations to bring the suit on behalf of the four co-plaintiffs, who alone had standing to sue (Opinion, p. 28).

Answer: 1. None of the communications are addressed to Respondent Dolman's counsel. They were addressed to Mrs. Dolman.

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hearsay representation of what a *Mr.* Forbes of Washington, D. C. is supposed to have said to her; whereas the Member of the Board of Directors is *Colonel* Forbes *of Philadelphia*. Colonel Forbes is the Director who represents the bondholders, and was one of the Directors who signed the Trust Agreement of 1960 on behalf of Pioche Mines Consolidated, Inc., thereby making this agreement an act of the Corporation by the unanimous written consent of the Board of Directors, as provided for in the by-laws.

2. They were not instructions to Respondent's attorneys, or to anyone else, to bring this suit. They were at most an expression of willingness to assist at some future time, presumably after the bases for the suit that were represented in Mrs. Dolman's communications, were demonstrated to be true, rather than false.

3. Each of the bases that was represented to these stockholders as reason for suit was withdrawn: T 1731:12-T 1732:16 (sale of equipment to Calaveras); T 1739:23-T 1745:15 (Oriental Refining); T 1764:21-23 and T 1771:1-5 (Cobb-Stringer Drilling); T 1772:15-T 1773:3 ($106,000.00 item); T 1771:11-T 1772:3 (Denver Oil).[4]

4. One of the stockholders who had personal knowledge of the purported "facts" on which the judgment was sustained on appeal knew to his knowledge that these "facts", were false. (See Affiidavit of Lawrence Rust Lee, p. 3, appearing in Vol. 24 of the Transcript of Record.)

5. Even had this stockholder:

(a) given an express direction to Respondent's attorneys to bring a given suit in his name, and

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[4]Despite the dropping of these charges, and the fact that no defendant was heard thereon, the Trial Court found:

"11. Assets of said corporation have been wasted through improvident investments without adequate consideration therefor." (R 1248, lines 8, 9) "The *corporations* also have an interest in defending against such charges, yet they were wrongfully deprived of the right to be heard."

(b) directed that the suit be brought on the basis of the claims contained in Mrs. Dolman's communications to that stockholder,

this would *not* have been an instruction to *withdraw* the stated claims, or to bring *another suit* based upon purported facts that the "co-plaintiff" knew to his own knowledge were false.

6. Mr. Duval (one of the indispensable "co-plaintiffs") wrote to Mrs. Dolman:

> "I will be glad to join you in the Pioche Mines suit *under the conditions mentioned in your letter, namely: that I 'incur no expense' and that I will 'never be called as a witness or have to appear in any action.' Both of these conditions are very necessary, as I am 88 and nearly blind and have very little more than enough to pay my keep in a house for old people, and a trip to California would be impossible.*" (Plaintiffs' Exhibit 2. The italicized matter does not appear at T 581.)

These two "conditions" are impossible of performance, and therefore, even Mr. Duval's expression of willingness to join at some future time is void.

However, Mr. Duval's name was thereupon used to give standing to Mrs. Dolman's charges, without Mr. Duval ever being informed of this fact.

He first learned that his name was being used upon being served with process out of the United States District Court for the District of Idaho.[5]

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[5]The Idaho action arose when Mrs. Dolman and Mr. Campini registered the Trial Court's judgment while an appeal was pending therefrom, in violation of 28 U.S. Code, Sec. 1963.

Thereafter, on October 2, 1964 Mr. Duval swore that he had never employed Respondent's counsel and was unaware of the unauthorized use of his name.[6]

7. Miss Katherine Hansbrough, another indispensable "co-plaintiff", was also served with process in the Idaho action. Thereupon she swore that she had never authorized or retained Respondent's attorneys in any capacity and that Dolman and her attorneys had refused to cease and desist from the unauthorized use of her name.[7]

8. The fourth "co-plaintiff", listed as "James Keith Marshall, Jr.," is dead. Respondents cite nowhere in the record any claimed authorization from Mr. Marshall to bring the instant proceedings in his behalf.

The affidavit of Mr. Marshall's widow, who now holds his stock, shows that there was and is no such person as "James Keith Marshall, Jr." and that the

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[6]"Affiant has not employed counsel for Plaintiffs or any of them to represent him in any action . . . The service of this process was the first notice Affiant had of this unauthorized use of Affiant's name by these attorneys . . .

"Because of Affiant's never having authorized his name to be used in the institution or prosecution of this suit and being informed that his name has been so used without his authorization, Affiant believes himself to be without remedy to prevent the continued unauthorized use of his name otherwise than requesting this Court to remove Affiant's name from the record of this case, and that any and all appearances purportedly made in Affiant's behalf by attorneys of record herein be stricken from the record." (Affidavit of E. P. R. Duval, sworn October 2, 1964).

[7]"Affiant has never authorized Sullivan, Roche, Johnson, and Farraher to appear for her in any action, nor has she ever retained them to perform professional services in her behalf. . . ." (Affidavit of Katherine Hansbrough, sworn October 19, 1964).

use of this name by Respondent's counsel was unauthorized and "unknown to her."[8]

Thus, it will be noted: (1) No authorization from the four "co-plaintiffs" appears in the record instructing the institution of the instant suit by counsel for respondent Dolman herein: (2) The communications addressed to Mrs. Dolman were induced by fraudulent charges that were later withdrawn: (3) Each of the purported "co-plaintiffs," affirmatively repudiated the act of the attorneys for Respondent Dolman who used their names without authority.[9]

The default of all defendants prevented the development of the testimony of these "co-plaintiffs."

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[8]"1) That she, Lockett Walton Marshall, is the surviving widow of James Keith Marshall who died testate in Fauquier County, State of Virginia, on the 16th day of September 1961.

"2) That she was apprised at a later date, that is, after the death of the said James Keith Marshall, that the above captioned litigation had been instituted in the U.S. District Court for the District of Nevada with one of the parties plaintiff being named or shown as James Keith Marshall, Jr.

"3) Affiant states that there was and is no such person as James Keith Marshall, Jr. to the best of her knowledge and that the use of James Keith Marshall, Jr. if purported to be James Keith Marshall of Fauquier County, State of Virginia, was entirely unauthorized and unknown to her.

"4) Affiant states that her husband, the late James Keith Marshall was the owner of certain stock certificates issued by Pioche Mines Consolidated, Inc., which certificates are now in her hands by virtue of the Will of the late James Keith Marshall.

"5) Affiant respectfully requests this Court to remove the name of James Keith Marshall, Jr. from the records of this case and that any and all appearances purportedly made on behalf of James Keith Marshall, Jr. by attorneys of record herein be stricken from the record." (Affidavit of Lockett Walton Marshall, October 21, 1964).

[9]The revelation that Respondent's counsel actually had no authorization from the four co-plaintiffs occurred in the Idaho action. This revealment was made possible by that Court's Order of Service on out-of-state parties, pursuant to 28 U.S. Code, Sec.

This testimony was material to the right of Respondent Dolman to maintain her suit in Court at all.

Thus, it is not "pure nonsense" (Respondent's phrase, Brief in Opposition, p. 5) for Petitioners to assert that the parties that were indispensable to the maintainance of the action, and whose names were added by counsel for Respondent Dolman, did not authorize the suit to be brought (Petition, pages 3, 9).

Default Excluded All Petitioners

Respondent's Brief in Opposition claims on page 7 that the default hearing was actually a trial in which Petitioners "fully participated".

Answer: The record is the answer:

1. "Mr. Horton (of counsel for Petitioners): Your Honor, may we object to counsel's presumptions in this regard and to the irregularities of the presentation relative to the proceedings now before the Court?

Court: I am not going to entertain your objection . . ." (T 849:8-12)

2. "Mr. O'Connor (of counsel for Respondent Dolman): . . . 'the said John Janney failed to appear at the designated time and place without any valid reason for so failing to appear.'

Mr. Horton: If Your Honor please, I would like——

1655. The hapless "co-plaintiffs" could not be directly contacted by Petitioners because they purportedly were being represented by counsel. Thus, Respondent's counsel were able to keep their uninformed "clients" in the dark until the Idaho Court entered its "Order for Service", producing the above sworn repudiations of counsel's claimed authority.

Court: No—no I can't hear you, you are in default and don't forget that.

Mr. Horton: Well, I would like to state——

Court: I don't want to hear you.

Mr. Horton: I would like to state that the representations——

Court: No—No——

Mr. Horton: —of counsel are incorrect.

Court: I don't want to hear you at all. Sit down." (T 710-T 711)

3. "Mr. O'Connor: . . . Now, with the Court's permission I would like to address myself to our application for the appointment of a Receiver . . .

Mr. Horton: Can we be heard on that question?

Court: No, it is a default case, you are in default.

Mr. Horton: We still have the question so far as Receivership is concerned.

Court: You are out; . . .

Mr. Horton: We would like to put on evidence in regard to this.

Court: No, you are not going to put on evidence at all. You are in default.

Mr. Horton: I would like to correct facts that have been misrepresented by counsel and not supported by the evidence.

Court: You are observers as far as all objections in this case are concerned, . . ." (T 1579:7-20, T 1619-1621)

4. "Court: You must remember you are in default.

Mr. Horton: We are not in default on the question of damages.

Court: You are in default on the question of damages . . . ." (T 1536:21-25)

5. "Mr. Horton: Your Honor, may we be heard on that?

Court: No, you are not going to be heard. Sit down. I will tell you when you can be heard. You are in default and you don't seem to understand it. I am going to hold you rigidly to this Rule." (T 1138:23-T 1139:2)

7. "Mr. Horton: Can we answer our opponent——

Court: Sit down or I will call a Marshal." (T 1238:18, 19)

8. "Mr. Horton: May we be heard?

Court: No." (T 2663:24, 25)

9. Respondent's counsel withdrew all purported claims of mismanagement.[10]

The disclaimer of claims for damages[11] was used to prevent the exposure of the falsity of the claims. When a specific matter was disclaimed as a basis for damage, the door was immediately closed to Petitioners to expose the falsity of the charge.

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[10]At T 1916:10 the Trial Court asks counsel for Respondent Dolman if any damages whatever were asserted for mismanagement, to which said counsel responded:

"Mr. O'Connor: Not a penny." (T 1916:12)

Counsel for Respondent Dolman specifically declared that the Ely Valley Mine had:

"nothing to do with the amount of damages." (T 2301:17, 18)

Again, at T 2278:5-7, counsel for Respondent Dolman is shown to have:

"withdrawn any reference to the Ely Valley Mine." (T 2278:5-7)

[11]T 1731:12-T 1732:16; T 1739:23-T 1745:15; T 1764:21-23 and T 1771:1-5; T 1772:15-T 1773:3; and T 1771:11-T 1772:3.

Finally, at T 1784:17-20 respondent Dolman, who swore the complaint that had to be sworn under Rule 23(b), testified that she could *not* say "any specific item of damage collectable against Mr. Janney by the corporations" when the suit was brought.

Examples of disclaimers by counsel for Respondents are set forth in the footnote.[12]

No Notice to Deponent Under Rule 37(d)

Respondent's Brief in Opposition does not deny that Petitioner Janney received no notice of any hearing under Rule 37(d). No hearing was had to determine the wilfulness of his non-appearance.

The motion for relief under Rule 30(b) was not noticed for hearing, but was ruled on, October 31, 1961, during a hearing noticed for another matter in another suit (T 322).

Following the ruling on the 30(b) motion (at which time the sworn amended complaint was changed to show jurisdiction[13]), the Trial Court did not then

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[12]T 1248:5-14; T 1249:9, 10; T 1251:8, 10; T 1253:7-14; T 1255:4-6; T 1257:8-12; T 1301:24-T 1302:1; T 1303:1-3; T 1304:7-9; T 1303:13-15; T 1308:19-21; T 1382:9, 10; 1382:12-15; T 1389:5, 6; T 1398:19-21; T 1400:19, 20; T 1402:25-T 1403:1; T 1405:8-10; T 1406:7, 8; T 1407:17-18; T 1410:1, 2; T 1412:23-25; T 1414:14, 15; T 1422:16-18; T 1426:25-T 1427:2; T 1429:16-18; T 1431: 15, 16; T 1433:9-11; T 1434:24, 25; T 1441:3-5; T 1444: 2-4; T 1445:15-17; T 1447:19-21; T 1454:23-T 1455:1; T 1459: 15-17 and T 1463:16-18.

[13]The change was made at the suggestion of the Trial Court (T 352:12, 13). The Trial Court acknowledged that without this change "there would be no diversity of citizenship" (T 352:11). The Complaint was altered and the Court thereupon (T 355) rejected the Petitioners' grounds that the Notice of Deposition *when filed* related to a Complaint which showed want of Jurisdiction.

notice for hearing the matter of sanctions under Rule 37(d). The proceedings were given over to the question of a bench warrant.[14] It was only when Respondent's counsel informed the Court:

> "Frankly, we would rather have a default judgment," (T 491:17, 18)

that the court struck the pleadings and entered the default.

A motion under Rule 12 to dismiss the Amended Complaint for failure to show jurisdiction was filed.

No ruling was made on the Motion to Dismiss (R 530, R 1380 ff.); nor was any Motion to Amend the Amended Complaint ever filed. Respondent's counsel made no effort to correct the Amended Complaint but instead, filed their Notice of Deposition. The fact that the Complaint was defective then formed one of the bases for Petitioners' Motion under Federal Rule 30

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[14]At T 480 counsel for respondent asks for "*a warrant of arrest . . . to compel the deposition of Mr. Janney.*"

T 482, shows that Petitioners objected to "*a bench warrant* for the arrest of Mr. Janney."

At T 484 the Court declares: "That argument won't deter me from *issuing the warrant,*" and after Petitioners' counsel states that he "wouldn't recommend to Mr. Janney that he come" *for his deposition which could kill him,* the Court declares: "Well, *the warrant is going to issue.*" (T 486)

Thus, the Court, counsel for Respondent Dolman, and counsel for Petitioners were *all* referring to "a warrant of arrest . . . *to compel the deposition of Mr. Janney.*"

These quotations were all omitted from the portions appearing in the Opinion (p. 18), thereby leading to the suggestion that the statement, "Under the circumstances of this case, I wouldn't recommend to him that he come," referred to the physical examination, not to the deposition.

In point of fact, the statement referred to the deposition, that could have killed the deponent if conducted at that time (R 756).

(b). Respondent's counsel waited until the day they filed their Motion for Default and then changed the Complaint by interlineation upon the suggestion of the Judge. The next day the default was entered. This procedure departed from the requirements of Rule 15 and from the "terms" required by 28 U.S.C. 1653.

Respondent's sworn complaint showed on its face that the Trial Court lacked jurisdiction of the suit. This complaint was not changed until *after* the time noticed for the taking of the deposition.

No notice was ever given the deponent. He was never given an opportunity to appear and testify or to summon others to testify.

Far from showing the notice and hearing required by Rule 37(d), the record shows that in the space of a few hours, the sworn Amended Complaint was altered by unsworn interlineation to show diversity (T 353); the Motion for relief under Rule 30(b) was then denied (T 408, R 1402); a month-old application for default and receivership was filed (R 726, R 727), and granted the next day (T 503). No notice of this motion was given as required by Rule 37(d) and no opportunity to be heard was ever given to Petitioner Janney. His sole notice of the proceedings was the entry of his default (R 745, T 503), not the setting of a motion.

There were several bases for the advice of counsel to the deponent that he need not respond in person, rather than by counsel, at the time noticed for the taking of the deposition;

1. The complaint showed lack of jurisdiction, and the regular correction of this would require a hearing either on the pending Motion to Dismiss or upon a motion of Respondent's counsel to correct their pleading to show the required diversity as a basis for jurisdiction. The time required for following this procedure would have allowed the deponent to recover.

2. The critical illness of the deponent required that he not abuse his health by appearing for a deposition that "could have resulted in his death" (R 756).

3. The filing of a timely motion under Rule 30(b) was a lawful procedure, on which the deponent and the Petitioners were entitled to a ruling. The Trial Court had exclusive control over the calendar to set the matter. This would require a re-setting of the deposition even if the Motion were denied, allowing the deponent time to recover.

4. This procedure had previously been sanctioned by the Trial Court on other occasions by *granting* timely motions under Rule 30(b) *after* the time noticed in the deposition.[15]

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[15]R. 1377, line 20; R. 1378, line 25.

Counsel for Respondent Dolman also used the filing of a timely Motion under Rule 30(b), even though no ruling had been made thereon, as a basis for instructing said Dolman not to testify whether her funds for bringing the action came "either directly or indirectly from Fidelity-Philadelphia Trust Company of Philadelphia." (R. 342, R. 343, R. 348, R. 349, R. 361A)

This gave rise to the inference that where the local rules did not provide for a party to obtain a hearing on his Motion for relief under Rule 30(b), that by filing his motion and taking all steps available to him in his effort to obtain relief under Rule 30(b), the deposition could not go forward until after a ruling was had on the Rule 30(b) motion. Any other procedure would

5. Both the Trial Court and Respondent's counsel had stated that the Dolman action would not be allowed to interfere with the preparation of the counterclaim against the Trust Company.[16] Admissions of the Trust Company of 12 years standing had been withdrawn and the mining company was obliged to develop secondary proof after the witnesses had died. The trial was imminent (R 700, R 649), and Peti-

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result in barring any effective means for relief under Rule 30(b), thereby extinguishing the right.

The Opinion assumes that a deponent faced with this problem should "get an order postponing the time of the deposition until his motion can be heard" (Opinion, p. 18). Such a motion is only available only under Rule 30(b). Therefore, this suggested procedure cannot cover the case where, as here, neither a setting for a Rule 30(b) motion was available, nor an order under Rule 30(b), granting delay until the motion could be heard.

[16]"Mr. Horton: . . . it is likely to seriously disrupt us with regard to these very serious matters if we get a notice of deposition . . .

Court: Well I will tell you—in the event anything like that happens you can inform the court; that would work both ways if counsel would be busy—also it isn't likely they can get ready to prepare for depositions.

Mr. Horton: Well, it would be easy to file a notice of deposition on Mr. Janney, for instance.

Court: We will wait and see what happens, we will meet those situations as they arise . . ." (T 280, T 281)

"Mr. Cornish (counsel for petitioners in the action against the Trust Company): . . . I think, Your Honor that the less activity that could be required of counsel in 310 and 311 (the Dolman actions), the more harmoniously and the more smoothly we will be able to work toward the preparation of action 101 (the counterclaim against Fidelity-Philadelphia Trust Company).

Mr. Kolb (counsel for Mrs. Dolman): I am glad Mr. Cornish said that because we would not be the cause of requiring any action on the part of his client." (T 281:21-T 282:2)

"Court (Addressing Mr. Horton): Whenever a motion is filed which seems to annoy you or annoy any other counsel, in view of the position counsel are in, I realize it is a lot of work and if there is some motion that seems to require it, get in touch with me and I will put it back on the slow track so it won't interfere with your problems. You don't have to worry about getting caught short." (T 107:11-17)

tioners had to rely on no interference from the Dolman case in order to mend this breach.

The failure to follow the procedure set out in Rule 37(d) prevented a showing that the Deponent had always been willing to depose;[17] that he thought himself entitled to apply for relief under Rule 30(b); that his absence was not wilful but in pursuit of what he believed to be his right and obligation to his health; and that as soon as he recovered sufficiently to depose he did so, and Respondent's counsel on that occasion examined him for a full day (November 30, 1961. R 1346 ff.).

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[17]The Court of Appeals Opinion assumes:

"So far as this record shows, he is still unwilling to depose." (p. 18)

This assumption fails to consider:

1. "Q (Mr. O'Connor): And as I understand your previous testimony, unless relief were granted to him under Rule 30(b), he would not submit himself for examination, is that correct? Is that your previous testimony?

A. (By Mr. Horton): No." (T 460, T 461)

2. The Motion to set aside the Default (R 754) was on the basis of a Doctor's affidavit that the deponent had recovered and could depose (R 755). However, the Trial Court insisted that only if the deponent had *not* recovered would he consider the Motion:

"Court: Unless you are going to contend Mr. Janney is not at this present time physically fit to participate in these court proceedings I don't think there is anything to listen to." (T 1544)

"Court: Would he be able at this time to have his deposition taken?

Mr. Horton: I believe so.

Court: The motion is denied. . . ." (T 1550:13-16)

3. Every motion for delay in a deposition (Rule 30(b)) is an implicit statement of a *willingness* to depose.

4. The only statement *from the deponent*, who was never given a hearing under Rule 37(d) was that *he was willing to depose*. (See Affidavit attached to Motion for Relief from Deposition on Oral Interrogatories Previously Noticed, filed November 10. 1960, part of Volume 25.)

Indispensable Parties Not Heard

The Brief in Opposition (p. 8) contends that the question of the corporations being indispensable parties disappears because the "corporations" have the "benefit" of the judgment entered in "their" favor.

It is precisely this contention that is rejected by the Fifth Circuit in *Young v. Powell* (179 F2d 147) quoted at p. 16 of the Petition. In addition, the corporations have a right to be heard on whether the suit, or the remedies sought, are either proper *or* a "benefit" to them.

The corporations traversed the original Complaint (R 54), and were prevented from answering to the merits on the Amended Complaint by their wrongful default, which was entered 24 hours after the Amended Complaint was changed to show diversity of citizenship (T 353). (The corporations had moved to dismiss the Amended Complaint as allowed by Rule 12 (R 630).)

The Court of Appeals has correctly set aside the default of the corporations. However, their wrongful default has prevented these corporations from having their day in Court to show:

(1) That Respondent Dolman, who swore the complaint, did not make demand upon the corporate authorities to assert her purported grievance. In fact, the record shows that she flatly REFUSED to tell the stockholders what her complaints were. (See footnote 1, above).

(2) The corporations were wrongfully denied their day in Court to require proof of the ma-

terial allegations of the complaint, both as to the existence of a valid claim which the corporation could enforce, and as to the presence in Court of any party qualified to assert the claim.

(3) They were not allowed to offer evidence against the allegations.

(4) They were not given the information sought in the Demand for Bill of Particulars (R 553);[18] nor were they allowed discovery to determine the basis of the claim.

(5) They were not allowed to show that the indispensable "co-plaintiffs" whose names were added to the Amended Complaint, had not authorized the use of their names.

(6) They were not allowed to show the prior representation of Dolman's attorneys.

(7) They were not allowed to show the extortionate threats of Dolman that preceded the litigation or the benefit that this litigation had for delaying or preventing the collection of the

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[18]The demand for Bill of Particulars sought "particulars as to each purported act of mismanagement, waste or employing corporate property for his own personal benefit" (R 559).

The Opinion appears to ignore this demand in stating (p. 21) "No motion for a more definite statement (Rule 12(e)) was made." Petitioners were entitled to particulars, pursuant to this Demand for Particulars, even if the Demand is treated as an interrogatory.

They were also entitled to this information under Rule 23(b). Rule 23(b) requires that a complaint in a derivative stockholders suit be stated "with particularity" both as to the nature of the claim, to show that the corporation could enforce it, *and* to show the failure or inability of the corporation to enforce such valid and subsisting claim, which the corporate interest *requires* be enforced. (See, for example, *Hawes v. Contra Costa*, 104 U.S. 450, 26 L. Ed. 827.)

counterclaim against Fidelity-Philadelphia Trust Company.

(8) They were not allowed the Trial by Jury which they had demanded (R 66).

(9) They were not allowed to prevent the misleading of the Trial Court by respondent's counsel.

(10) They were not allowed a hearing on whether their properties had been organized, developed and equipped under a President who was a defrauding "promoter", or whether he was a competent, efficient, honest and highly respected engineer, the availability of whose services to the corporations had induced the investment of some million dollars of indispensable investment capital. (This latter is the position taken in the counterclaim of Pioche Mines Consolidated and John Janney, filed by respondent's attorneys, R 2, R 26, R 27; and by the investors who supplied the development capital. See footnote 2 above).

(11) They were not allowed to show that no investment was ever made on the basis that Pioche Mines Consolidated owned the Ely Valley Mine (e.g. Lee Affidavit, Vol. 24); but on the other hand, hundreds of thousands of dollars were invested on the basis that Pioche Mines Consolidated did *not* own the Ely Valley Mine (e.g. $600,000 in debentures of Pioche Mines Consolidated and "$500,000 or more" in Ely Valley Mines Inc. and Pioche Mines Consolidated, Inc. (footnote 2 above).)

The corporations have a right to be heard on whether such results are for their "benefit." Yet their default, correctly held wrongful, deprived them of their day in Court.

REASONS FOR GRANTING THE WRIT

Consequences of the Default

Despite the lack of a hearing under Rule 37(d), Petitioner Janney has had a million dollar default judgment entered against him, and in addition, he has had counterclaims against his former attorneys and Dolman stricken. Striking these counterclaims bars his recovery of a judgment for hundreds of thousands of dollars and for tens of thousands of shares of his stock.

For their part, the corporations, pursuant to their wrongful default, have suffered hundreds of thousands of dollars of damage at the hands of the receiver (e.g., R 1204 ff; R 1214, 15; R 1216 ff; R 1220, 21) and have been prevented by the action brought by their former attorneys from prosecuting the case against the Trust Company.

Damages arising from the delay in collection of a $10,000,000 counterclaim (R 24) amount to hundreds of thousands of dollars a year.

Conflicts of This Case With Other Decisions

The instant $1,000,000 default judgment and restraining order is novel in the following respects:

1. Efficiency in the operation of a mine *increases* the measure of damage. Inefficiency would

have decreased it, by decreasing the profits that are here used as the basis for damage. No profiteering is shown. *All* of the "profits" were put back into the mine, month by month, thereby increasing the next month's profit.

2. Damages based on a claimed fraud (Opinion, pp. 21-23) are not set forth with particularity in the pleading as required by Rule 9(b) FRCP. No particularity was required in this case. Not even the Demand for Bill of Particulars[18] produced the basis for the claim. The Court, at the close of plaintiff's case, was himself ignorant of the claimed basis for damages (T 1899, line 12). The judgment is rationalized (Opinion, pp. 22, 23) on the basis of suppositions that no attempt was made either to plead or to prove; which suppositions are false to the personal knowledge of one who is supposed to have asserted the claim, but did not; and would not assert it because he knew it to be false. (Lee Affidavit page 3, Vol. 24 of Transcript). Yet the testimony of this "co-plaintiff" is precluded by the defualt.

3. The sanctions taken against a party placed in default are extended to exclude his participation on the question of damages. Only testimony showing damage in some amount, when there is no damage, is sought from him. The defaulted defendant was faced with answering a "when did you stop beating your wife" question. If he could not show how much he had damaged the corpora-

tion, which in fact he had nurtured, served without pay and championed through 20 years of litigation, then there was nothing on which his testimony was sought.

4. A property that was developed by the investment of hundreds of thousands of dollars of new money to produce a profit is *then* declared "converted," and damages are awarded because the operating income is applied to the development and further equipment of the mines and not paid over to another corporation that has supplied none of the funds needed for the development. Yet no party in interest to transaction, had opportunity to be heard.

5. An extraordinary remedy (a restraining order) is applied by default without allowing any of the three parties defendent, who were each affected thereby, to be heard; even though the default of two of these three parties is ordered set aside as wrongful (Opinion, pp. 20, 24).

Even had Petitioners been heard, the decision below would conflict with *Erie R. v. Tomkins* (304 U.S. 64, 82 L.Ed. 188, 58 S.Ct. 817, 114 ALR 1487) and with applicable state (and Federal) laws.

1. War Production Board contracts contributed a substantial portion of the "Net Profit from Operations" that form the basis of the $1,000,000 judgment.

2. Exploration contracts that made up $71,900.13 of the $1,000,000 judgment (T 2998).

All of these contracts, and the Federal Statutes relating thereto, *required* that the Ely Valley funds be put exactly where they were put, back into the mine. These contracts do *not* allow the paying over of profits from the operations of the mine, even to the investors who owned the mine, let alone to Pioche Mines Consolidated, Inc. which had no interest in the mine. Yet no defendant had been heard on this.

3. The purported claim arising out of the alleged "conversion" of the mine *by a trustee*,[19] who was never made a party to the suit, is barred by the applicable Nevada Statute of Limitations.[20]

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[19]The conveyance by the Trustee in compliance with the powers of his trust (T 2996) is "the conversion relied on" (Opinion, p. 23).

The Ely Valley Trust Agreement states:

"said loan or loans may, at the option of the lender, be represented or converted into shares of Treasury stock in a corporation, which is proposed later to be formed for the operation of the above named mining claims, and in such case the said stock shall be in that amount which shall be the proportion to the total amount of issued and outstanding stock (including loans in payment of said stock) which the fractional interest (had the election to take stock not been exercised), bears to the whole property.

"It is further agreed that *said Trustee is authorized and empowered to form a corporation* when in his judgment it may become necessary or advisable so to do in carrying into effect the purposes of this trust, *and he shall convey the properties held hereunder to the said corporation* . . ." (Exhibit A attached to Plaintiff's Exhibit 19, reproduced in Volume 23 of the Transcript of Record, pp. T 2995, T 2996; emphasis added.)

[20]Section 11.808 of the Nevada Revised Statutes sets forth the statute of limitations for mining properties:

"No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained *unless it appear that the plaintiff* or those through or from whom he claims *were seized or possessed of such mining claim*, or were the owners thereof according to the laws and

4. Had the Ely Valley Mine been "converted" on the date claimed, 1949, the Nevada Statute of Adverse Possession would bar any claim to the property *or* to the profits arising from the operation thereof.[21]

Plaintiff's Exhibit 22 showed that the occupation by Ely Valley Mines, Inc. of the Ely Valley Mine was made pursuant to a written instrument, duly recorded, that was a conveyance of the premises in question. Therefore, even if this conveyance were a "conversion" as assumed by the Court of Appeals, the continued possession of the mine by Ely Valley Mines, Inc. from the date of the conveyance down to the time of the filing

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customs of the District embracing the same, *within two years before the commencement of such action.*"

Section 11.070 of the Nevada Revised Statutes provides:

"*No cause of action* or defense to an action, *founded upon title to real property, or to rents or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action* or making the defense, or those under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, *was seized or possessed of the premises in question within five years before the committing of the act in respect of which said action is prosecuted* or defense made." (Nevada Revised Statutes, 11.070; emphasis added.)

Pioche Mines Consolidated was not "seized or possessed" of the Ely Valley Mine at any time.

[21] Section 11.110 of the Nevada Revised Statutes provides:

"*Whenever it shall appear that the occupant,* or those under whom he claims, *entered into the possession of premises, under claim of title* exclusive of any other right, *founding such claim upon a written instrument as being a conveyance of the premises in question,* or upon the decree or judgment of a competent court, *and that there has been a continued occupation and possession of the premises* included in such instrument, decree, or judgment, or of some part of such premises, *under such claim, for five years, that premises so included shall be deemed to have been held adversely, . . .*" (Nevada Revised Statutes, Sec. 11.110; emphasis added.)

of the suit, would bar any claim made upon an ownership that had been "converted" in 1949.

5. The Opinion (p. 32, par. 4) orders the counterclaims of the corporations reinstated and their defaults reversed. This is empty gesture because the counterclaims assert a failure to comply with Rule 23(b), and the judgment in the Rule 23(b) action is affirmed with finality *against* the corporations who were parties defendant, but not heard.

Setting aside their defualt should allow the corporations to plead to the Amended Complaint, because the corporations' default was entered before the time to answer this complaint expired. Therefore, the judgment also should be set aside. Pleading to a complaint that has gone to judgment is an anachronism.

CONCLUSION

The decision below leaves the owners of the Ely Valley Mine to assume the risks and supply the capital in their attempts to bring the property into production, and take the loss if the venture fails. But if it succeeds, the investors are held to owe the profits to another party that supplied none of the investment in either land or capital. This result conflicts with innumerable cases (e.g. *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 593, 23 L.Ed. 328, 331, 2) and with common sense, and deprives investors of the right to the enjoyment of their property without due process.

Such a claimed basis for the judgment prevents corporate financing by declaring that investors' profits belong to someone else, and only the risks, the labors and the losses accrue to the investors. The repercussions of such a basis for derivative stockholders' actions on corporate activity from one end of the country to the other are difficult to predict.

A recorded chain of title going back forty years is held to actually reflect an interest in the property in a completely different corporation. *That* corporation, formed in 1928 with a completely different set of properties,[22] issued debentures that it is now held should also have encumbered this other mining property. All without either the corporation that is the present owner or the corporation that is the claimed former owner, being heard thereon.

Because of the serious questions of both substantive and procedural law involved in these proceedings, Petitioners respectfully petition this Honorable Court to review the decisions below.

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MORSE AND GRAVES,
ROSCOE H. WILKES,
T. DAVID HORTON,
Of Counsel.

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[22]T 3939. See also first Meeting of Incorporators and Directors, in the front of Plaintiff's Exhibit 15.